Supreme Court, U. S.
FILED
MAY 14 1980
MICHAEL RODAK, JR., CLERK

No. 79-1062

In the Supreme Court of the United States

OCTOBER TERM, 1979

GERALD MARKHAM, A/K/A JERRY J.D. MARKHAM,
PETITIONER

v.

PETER J. PITCHESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

FRANK J. MARINE
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1062

GERALD MARKHAM, A/K/A JERRY J.D. MARKHAM,
PETITIONER

v.

PETER J. PITCHESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 605 F. 2d 436.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1979. A timely petition for rehearing was denied on October 9, 1979 (Pet. App. 5). The petition for a writ of certiorari was filed on January 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the applicable provisions of the Webster-Ashburton Treaty between the United States and Canada, petitioner is extraditable to Canada for

marijuana-related offenses committed in that country prior to the effective date of the most recent amendments to the treaty.

STATEMENT

After an extradition hearing pursuant to 18 U.S.C. 3184 in the United States District Court for the Central District of California, the district court certified that there was probable cause to support petitioner's extradition to Canada (Tr. 35).[1] Thereafter, petitioner filed a petition for a writ of habeas corpus alleging, *inter alia*, that the offenses for which extradition was sought were not covered by the extradition treaty between Canada and the United States that was in force at the time the offenses at issue were committed (Tr. 2-25). The district court denied the petition (Tr. 42). The court of appeals affirmed (Pet. App. 1-4).

The evidence presented at the extradition hearing showed that on June 3, 1975, petitioner and his co-defendant arrived at Dorval International Airport in Montreal, Canada, on a flight from London, England. At that time, customs inspectors discovered approximately 15 pounds of hashish concealed in petitioner's and his co-defendant's sleeping bags, and they were arrested. Petitioner was charged with importing hashish, in violation of Section 5(1) of the Canadian Narcotics Control Act, possession with intent to traffic in hashish, in violation of Section 4(2) of the Narcotics Control Act, and conspiring to import hashish, in violation of Section 423(1)(b) of the Canadian Criminal Code (Tr. 2-3). After

[1] "Tr." refers to the Clerk's Transcript of the record on appeal.

a preliminary hearing, petitioner was released and ordered to appear on May 4, 1976, for trial. Petitioner failed to appear as ordered, and a warrant for his arrest was issued (Tr. 3).

On January 13, 1978, petitioner was arrested in California by the Riverside, California, Sheriff's Department after he was stopped for a traffic violation and a record check revealed the existence of the Canadian arrest warrant. Following petitioner's arrest in California, the extradition proceedings described above were initiated (Pet. 4).

ARGUMENT

Petitioner contends that he may not legally be extradited to Canada for the marijuana-related offenses with which he was charged because those offenses were committed prior to March 22, 1976, the effective date of amendments to the Webster-Ashburton Treaty of August 19, 1842, as amended, 44 Stat. 2100, between the United States and Canada, which he contends are not retroactive. Those amendments expressly rendered such offenses extraditable. 27 U.S.T. 983, 988, T.I.A.S. No. 8237. The court of appeals correctly upheld his extradition.

As the court of appeals recognized (Pet. App. 3), it was established long ago that "extradition treaties, unless they contain a *clause to the contrary*, cover offenses committed prior to their conclusion." *Gallina* v. *Fraser*, 177 F. Supp. 856, 864 (D. Conn. 1959), aff'd, 278 F. 2d 77 (2d Cir.), cert. denied, 364 U.S. 851 (1960). Accord, *Galanis* v. *Pallanck*, 568 F. 2d 234, 237 (2d Cir. 1977); *Cleugh* v.

Strakosch, 109 F. 2d 330, 335 (9th Cir. 1940); *United States ex rel. Oppenheim* v. *Hecht*, 16 F. 2d 955, 956-957 (2d Cir.), cert. denied, 273 U.S. 769 (1927).[2]

The Webster-Ashburton Treaty, as amended effective 1976, does contain the following "clause to the contrary" (Article 18, Section (2), 27 U.S.T. 983, 995, T.I.A.S. No. 8237 (emphasis added)):

> This Treaty shall terminate and replace any extradition agreements and provisions on extradition in any other agreement in force between the United States and Canada; except that the crimes listed in such agreements *and* committed prior to entry into force of this Treaty shall be subject to extradition pursuant to the provisions of such agreements.

[2]Contrary to petitioner's suggestion, extradition for an offense committed prior to the effective date of an extradition treaty does not violate the Ex Post Facto Clause of the Constitution, since that Clause prohibits only legislation "which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed" (*Dobbert* v. *Florida*, 432 U.S. 282, 292 (1977), quoting *Beazell* v. *Ohio*, 269 U.S. 167, 169 (1925)), and since extradition proceedings are not criminal and extradition is not punishment for crime. *United States ex rel. Oppenheim* v. *Hecht*, *supra*, 16 F. 2d at 956.

It is undisputed that petitioner's marijuana-related offenses were punishable as crimes under both Canadian law and the law of the United States at the time the offenses were committed.

As the court of appeals concluded, however, this provision does not support petitioner's contention that the 1976 Treaty is inapplicable to all crimes committed prior to 1976 (Pet. App. 4):

> Article 18 clearly dictates that the 1842 Treaty provisions must apply *only* to crimes which were (1) listed in or covered by that earlier Treaty, and (2) committed prior to 1976. In the instant case, only the requirement that the crime be committed prior to the date of the newly-amended Treaty has been satisfied. Therefore, because marijuana trafficking is not listed in the original 1842 Treaty, application of the newly-amended Treaty is not barred.[3]

Thus, the court of appeals held that so long as the extradition demand had been made subsequent to the effective date of the treaty, petitioner was subject to extradition regardless of the date of the commission of the offense.

There is no constitutional or statutory bar to an agreement by the United States to extradite persons for offenses committed prior to the effective date of an extradition treaty, and, as indicated above, the general principle is that such treaties have retroactive effect unless the contrary can be ascertained from the language or

[3]In the alternative, the government would argue, as it did in the court of appeals, that, although marijuana-related offenses were not specifically listed in the pre-1976 Treaty provisions, such offenses came within the general category of "narcotics" offenses and hence were covered by the pre-1976 provision, which authorized extradition for offenses "of the traffic in narcotics." *In re Edmondson*, 352 F. Supp. 22, 26-27 (D. Minn. 1972); cf. *Collins* v. *Loisel*, 259 U.S. 309, 311-312 (1922).

history of a particular treaty. The holding of the court of appeals in the instant case that the coverage of offenses is retroactive under this particular treaty is not in conflict with the holding of any other court of appeals and presents no issue justifying review by this Court.

Contrary to petitioner's contention (Pet. 6-7), the decision does not conflict—indeed, is wholly consistent—with the Second Circuit's holding in *Galanis* v. *Pallanck*, 568 F. 2d 234 (1977). *Galanis* involved an extradition to Canada from the United States for offenses related to a securities fraud committed prior to the effective date of the 1976 Treaty. The defendant in that case had contended that Art. 4(1)(i) of the 1976 Treaty, which prohibits extradition of one who "has been tried and discharged or punished in the territory of the requested State for the offense for which his extradition is requested," was retroactively applicable to extradition for offenses charged to have been committed prior to the effective date of the treaty. The court of appeals held that the defendant's extradition was indeed barred by Art. 4(1)(i) of the 1976 Treaty (568 F. 2d at 239 (emphasis added)):

> We therefore hold that the double jeopardy clause of the [1976] treaty applies in all proceedings begun after the exchange of ratifications *even though the crime occurred before*.[4]

---

[4]Although the Second Circuit chose the commencement of extradition proceedings, while the court below relied on the extradition demand, as the date before which the treaty provisions must be effective in order for them to control, since in this case both the beginning of the extradition proceedings and the extradition demand followed the effective date of the amended Treaty, petitioner is extraditable regardless of which approach is followed.

Thus, even though the opinion in *Galanis* includes dictum that appears to conflict with the decision of the Ninth Circuit, the *holding*—that the double jeopardy provision of the amended treaty is retroactive—is unambiguously consistent with the decision below.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

FRANK J. MARINE
Attorney

MAY 1980

---

[5]Nor does the decision in this case conflict with *United States* v. *Flores*, 538 F. 2d 939 (2d Cir. 1976). That case involved the construction of treaties between Spain and the United States, not the treaty involved in this case. Moreover, as the Second Circuit explained in *Galanis* v. *Pallanck*, *supra*, 568 F. 2d at 238, n.5, *Flores* "held only that evidence of offenses committed prior to the effective date of the new treaty was admissible." The issue involved in this case—what offenses are extraditable—was not presented or decided in *Flores*.

DOJ-1980-05